Supreme Court, U.S.
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No. 00- 001321

IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE INC.,
Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., TPC CORPORATION AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *Noerr-Pennington* doctrine, which is rooted in this Court's construction of the Sherman Act, applies outside the antitrust context, specifically to fraudulent petitioning activities that are unlawful under the RICO statute?

Whether intentional misrepresentations that are made to courts and other adjudicative bodies as part of an attempt to inflict collateral harm on competitors are subject to immunity under the *Noerr-Pennington* doctrine?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Pursuant to Sup. Ct. R. 29.6, Petitioner Bath Petroleum Storage Inc. declares that it is a wholly-owned subsidiary of E.I.L. Petroleum, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was issued on October 11, 2000; is reported at 229 F.3d 1135 (table op.); and is reproduced in the Appendix ("App.") at 1a-3a. The Order of the United States District Court for the Western District of New York dismissing petitioner's complaint was issued on February 25, 2000 (No. 98-CV-6138 CJS); and is reproduced in App. at 4a-42a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on October 11, 2000, and the petition for panel rehearing and for rehearing en banc was denied November 17, 2000, App. 43a-44a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) & (d):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> It shall be unlawful for any person to conspire to violate any of the provisions . . . of this section.

Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

INTRODUCTION

In this case, the court of appeals held (1) that the *Noerr-Pennington* doctrine[1] immunizes petitioning activities that would otherwise violate the Racketeer Influenced Corrupt

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[1] The doctrine takes its name from this Court's first decisions that the Sherman Act does not hold liable petitioning activity used to anticompetitive ends. *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965).

Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; and (2) that misrepresentations made in the process of petitioning the government are not immunized by *Noerr-Pennington* if the government did not rely on the misrepresentations in its disposition of the action. In arriving at these conclusions, the Second Circuit, like the district court below, provided scant explanation for either conclusion. On the first point, the courts cited, without elaboration, various courts of appeals that had similarly concluded that *Noerr-Pennington* immunity is applicable outside the antitrust context. On the second point, the district court—the only of the two courts to address this question explicitly—cited one other court of appeals, again without elaboration, for the rule that only "material" misrepresentations are excepted from *Noerr-Pennington.*

In so holding, the Second Circuit brought itself into direct conflict with: (1) other courts of appeals that have stated that the *Noerr-Pennington* doctrine stems from a construction of the Sherman Act, and thus is not applicable outside that context; and (2) other courts of appeals that have not adopted the requirement that misrepresentations submitted to a judicial body be material before they are excepted from *Noerr-Pennington* immunity. See *infra* at 10-15. The Second Circuit's decision thus creates, and adds to, substantial uncertainty in the federal courts about the scope of the *Noerr-Pennington* doctrine outside the antitrust context, and the contours of the exception for fraud or misrepresentation.

The Second Circuit's decision is also in substantial tension with decisions of this Court. On several occasions, this Court has suggested that the *Noerr-Pennington* doctrine has its roots in a construction of the Sherman Act, and to the extent the First Amendment right to petition is implicated, it is only to inform a proper interpretation of the Act. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 144 (1961); *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); *infra* at 16-17. Similarly,

this Court has demonstrated that, to the extent *Noerr-Pennington* is to be extended beyond the Sherman Act context, it must be done through a reasoned construction of the federal statute at issue. See *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 741-43 (1983); *infra* at 17-18. The Second Circuit did not even suggest why such immunity is inherent in a construction of the RICO statute, and relevant differences between the RICO statute and the Sherman Act demonstrate that an extension of *Noerr-Pennington* immunity into that arena is inappropriate. In particular, whereas group efforts to petition the government can, and often do, have legitimate, meritorious ends, and are thus outside the reach of the Sherman Act, when such activity violates a predicate criminal act there are no similar countervailing social benefits that would support immunity from RICO liability. The only potential source of support for the Second Circuit's decision is the First Amendment's Petition Clause; however, a move to constitutionalize *Noerr-Pennington* creates the risk that petitioning immunity—initially applicable only against claims arising under the Sherman Act—will be wrongly extended to other federal and state causes of action, both statutory and common law.

Similarly, the Second Circuit's rule that only intentional misrepresentations submitted to a court or judicial body that are *material* to that body's disposition of the action is inconsistent with this Court's teaching that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). Whereas the remedy for fraud and misrepresentations in the political arena is robust and open debate, no such panacea is available in the judicial context, in which the courts, or adjudicative agencies, rely on the representations of the parties before them. Misrepresentations undermine the legitimacy of the judicial process, and this is

true regardless of whether the judicial body is eventually influenced by the misrepresentations or not. Whereas speech in the political arena must not be chilled, attempts to deceive in the judicial arena must be guarded against, and an extension of *Noerr-Pennington* immunity to protect such misrepresentations must be corrected.

Certiorari should be granted to resolve the important conflicts among the courts of appeals; to decide the important and recurring question of the application and scope of the *Noerr-Pennington* doctrine and its statutory foundation; and to ensure that the doctrine not be extended to cover intentional attempts to deceive courts and other judicial bodies, whether successful or not.

STATEMENT OF THE CASE

Petitioner, Bath Petroleum Storage Inc. ("BPSI") operates a salt cavern storage facility at Bath, New York, in which it stores liquid petroleum gas. Respondents are TPC Corporation ("TPC"), its affiliates, Market Hub Partners, L.P., and Market Hub Partners, Inc. (collectively "MHP") and Coalition for Resources and Environment in the Southern Tier, Inc. ("CREST"), a non-profit corporation. Since its inception, CREST has been funded by MHP and/or TPC and used by them as a front for the anticompetitive purposes alleged in the Complaint.

Respondent TPC, through MHP, is the largest owner of natural gas salt cavern storage deliverability in the United States. Since 1995, through one of its affiliates, MHP has been developing a salt cavern storage facility for the purpose of storing high deliverability natural gas in Tioga, Pennsylvania. Tioga is approximately 50 miles southeast of Bath, New York.

In 1996, BPSI entered into a lease agreement with CNG Transmission Corp. ("CNGT"), an interstate natural gas

pipeline company. Under the agreement, BPSI would provide CNGT with natural gas storage capacity from its existing caverns by late 1997 and from caverns under construction by 1999. CNGT was obligated to apply for a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission ("FERC") to allow BPSI to transfer a portion of its facility that had been used to store liquid petroleum gas into a storage facility for natural gas. Both CNGT and BPSI agreed to apply to obtain necessary permits from the United States Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation ("NYDEC").

In May 1996, CNGT filed an application with FERC for the required certificate to use the BPSI facility for natural gas storage. In response to a public notice filed by FERC, MHP filed a motion to intervene in the proceeding. The motion alleged that BPSI had already begun construction, drilling, solution mining and site preparation of natural gas storage caverns without FERC authorization.

On September 10, 1996, FERC issued a determination that BPSI could not develop its salt caverns for gas storage without obtaining the requisite FERC authorization. CNGT responded by amending its application, in response to which MHP filed another protest. In its protest, MHP alleged that it had discovered evidence of a geological fault at the facility's site, and that the site was unsafe and constituted an environmental hazard. In support of these allegations MHP filed false affidavits prepared by the engineers it had hired to produce geological reports supportive of its Tioga project.

MHP filed virtually identical objections to BPSI's applications to the EPA for necessary underground storage permits. CREST, at MHP and TPC's behest, filed the same with NYDEC, seeking to impede BPSI's permit applications with that agency.

This was not the first salt cavern storage project that MHP, TPC and CREST's affiliates had sought to bar from entering the high deliverability natural gas salt storage industry in the northeastern United States. From 1995-97, MHP and another non-profit corporation it funded, Concerned Citizens of Cohocton Valley ("CCCV"), later a member of CREST, filed objections with FERC as well as various lawsuits seeking to stop the Avoca Natural Gas Project, located in Avoca, New York, a few miles from Bath. That effort succeeded. In May 1997, the Avoca project was abandoned.

Similarly, MHP filed spurious objections with FERC related to an application filed by New York State Electric and Gas Corporation with regard to the Seneca Lake Storage project, also located in New York. FERC rejected MHP's assertions.

In each case, the modus operandi was the same. MHP would, either itself, or through a sham environmental group, oppose any salt cavern storage projects which could pose a threat of competition to MHP and its Tioga project. Either MHP or the environmental group would file fraudulent and misleading statements concerning the would-be competitor with state or federal regulatory agencies. The efforts were undertaken to delay or prevent the other entities from entering the high deliverability natural gas storage market.

In November 1997, CNGT informed BPSI that, as a direct result of the defendants' scheme to thwart regulatory approval, CNGT had decided to terminate the lease with BPSI. This information was made public on January 29, 1998, one day after FERC dismissed CNGT's application, without prejudice, for its failure to respond in a timely fashion to its latest inquiries. Significantly, later in 1998, EPA, the only agency to treat the permit applications on their merits, issued the underground storage permits sought by BPSI and rejected MHP's claims, including its assertion that a

geological fault under the BPSI facility made the project environmentally unsafe.

In March, 1998, BPSI filed suit against MHP and their corporate parent, TPC. In addition to several state law claims, the Complaint alleged that MHP violated and conspired to violate the RICO statute, 18 U.S.C. § 1962(c) & (d), through a pattern of mail and wire fraud, and that MHP violated § 2 of the Sherman Act, 15 U.S.C. § 2. It contended that TPC controlled the board of directors and officers of Market Hub Partners, Inc., and together they attempted to eliminate any underground gas storage facility in the Northeast that could compete with its Tioga, Pennsylvania facility.

Specifically, BPSI claimed that in its submission to FERC, MHP had stated: (1) that there existed a geologic fault at the facility, when no such fault existed; (2) that BPSI's cavern design deviated materially from established guidelines, when in fact its design was superior to MHP's own Tioga cavern; (3) that there is evidence of structural failures at the site, when there is none; (4) that the existing caverns are structurally and mechanically unstable for high pressure natural gas storage and have the potential to cause severe environmental harm, when tests showed that its caverns were suited for the storage of natural gas; and (5) that there is the potential for the underground salt cavern storage facilities to collapse, jeopardizing human health and environmental safety, when there was "very little possibility" of such catastrophe. App. 64a-66a (Complaint, ¶¶ 72-73). BPSI alleged that these misrepresentations ultimately caused CNGT to terminate its lease with BPSI. *Id.* at 68a (Complaint, ¶ 83).

Defendants moved to dismiss BPSI's complaint for failure to state a claim upon which relief can be granted. The district court granted the motion on the basis that defendants' actions were shielded from liability by the *Noerr-Pennington*

doctrine. The court found that the defendants' actions did not meet the two-pronged test to establish the "sham" exception to the *Noerr-Pennington* doctrine: that (1) the activities were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) that the activity is, at base, "'an attempt to interfere directly' . . . through the 'use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'" *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("*PREI*") (citation omitted; emphasis and brackets in original omitted).

The court found that defendants' actions were not baseless, because "the record supports at least some of the[] claims" that BPSI challenged. App. 35a. As for the claims that MHP had misrepresented certain facts to the Commission, the court recognized that "[o]ther courts have held that a party's misrepresentations to a court can constitute a sham for purposes of *Noerr-Pennington*, where 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy,'" *id.* at 31a (citing *Kottle* v. *Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998)). Nevertheless, in considering whether these misrepresentations would be subject to *Noerr-Pennington*, the court would examine:

> the outcome of the proceedings, including findings made by the relevant administrative tribunals, the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.

Id. (quoting *Music Center S.N.C. Di Luciano Pisoni & C.* v. *Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995)) (quotation marks omitted). On this basis, the court concluded that "even if MHP's claims were not true, there is no indication that those statements had any effect on

the duration or outcome of the FERC proceeding," since "FERC dismissed CNGT's application, without prejudice, because CNGT had failed to provide information which FERC had repeatedly requested." *Id.* As such, the misrepresentations were not "material."

In a summary order, the Second Circuit affirmed, agreeing with the district court that Defendants' behavior was not objectively baseless for "substantially the same reasons." App. 3a.

REASONS FOR GRANTING THE PETITION

MHP's actions before FERC were clearly targeted at derailing the lease transaction between BPSI and CNGT. Its actions were part of a conspiracy to block BPSI from entering the natural gas storage market, and in doing so MHP violated the RICO statute, and mislead federal agencies, including FERC. In conflict with other courts of appeals and with decisions of this Court, the Second Circuit held (1) that the *Noerr-Pennington* doctrine blocks not only allegations against MHP for Sherman Act violations but also for violations of RICO; and (2) that even MHP's intentional attempts to mislead FERC through fraudulent misrepresentations regarding the Bath facility are subject to *Noerr-Pennington* immunity.

I. THE SECOND CIRCUIT'S DECISION IS PART OF A BROAD CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE.

A. The Second Circuit's Decision That The *Noerr-Pennington* Doctrine Applies Outside The Antitrust Context Conflicts With The Decisions Of Other Courts Of Appeals And With Decisions Of This Court.

Both the Second Circuit's decision and the district court's decision below rely on the mistaken premise that the *Noerr-*

Pennington doctrine applies to claims brought, not only under the Sherman Act, but also under the RICO statute, 18 U.S.C. § 1961 *et seq*. See App. 32a. The court offered no support for this conclusion, merely citing the courts of appeals that had applied *Noerr-Pennington* in RICO and other areas outside the antitrust context. See *id.* (citing *International Bhd. of Teamsters, Local 734 Health Workers and Welfare Trust Fund* v. *Phillip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir. 1999); *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 128-29 (3d Cir. 1999); *Hirschfeld* v. *Spankos*, 104 F.3d 16 (2d Cir. 1997)).

In extending *Noerr-Pennington* to claims brought under RICO, the Second Circuit deepened an already existing conflict among the circuits. On the other side of the conflict, the Tenth Circuit most recently held that a threat of litigation is not protected from state law claims by virtue of the *Noerr-Pennington* doctrine because such immunity applies only to claims brought under the Sherman Act. *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 208 F.3d 885, 889-90 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000). The court further found that the threats were not covered by the First Amendment either, as they were not actually instances of "petition[ing] the Government." Other circuits have grappled with this question of when to apply *Noerr-Pennington* immunity and when to apply the First Amendment right to petition, noting that *Noerr-Pennington* derives specifically from a construction of the Sherman Act. See *Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983) ("*Noerr* was based on a construction of the Sherman Act. It was not a first amendment decision." (footnotes omitted)); cf. *Whelan* v. *Abell*, 48 F.3d 1247, 1253-54 (D.C. Cir. 1995) (refusing to decide whether *Noerr-Pennington* applies to common law torts of malicious prosecution or abuse of process).

B. The Second Circuit's Treatment Of The "Fraud Exception" To The *Noerr-Pennington* Doctrine Conflicts With The Decisions Of Other Courts Of Appeals And With Decisions Of This Court.

The Second Circuit's holding that only "material" misrepresentations are excepted from *Noerr-Pennington* immunity essentially eviscerates the "fraud or other misrepresentation" exception by subsuming it within the "sham" exception for litigation of "objectively baseless" claims. See *PREI*, 508 U.S. 49, 51 (1993). The Third Circuit's decision in *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999), upon which the district court relied, is explicit in its view that the fraud exception is part of the exception for "objectively baseless" litigation:

> We decline to carve out a new exception to the broad immunity that *Noerr-Pennington* provides. Rather, we will determine whether [defendant's] petition was objectively baseless under the Supreme Court's test in *PRE*, *without regard to those facts that [plaintiff] alleges [defendant] misrepresented.* If the alleged misrepresented facts do not infect the core of [defendant's] claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Pennington* immunity . . . .

Id. at 123. The fraud exception then, according to the Second Circuit below and the Third Circuit in *Cheminor*, is no more than the relatively paltry recognition that a lawsuit won solely on the basis of fraud lacks an objective basis.

Myriad cases, however, adopt a far more robust conception of the "fraud or other misrepresentation" exception, which goes beyond the "objective basis" of the lawsuit and considers whether the specific activity is the sort of petitioning that *Noerr-Pennington* is meant to protect. *Whelan*, 48 F.3d at 1255 ("However broad the First Amendment right to petition

may be, it cannot be stretched to cover petitions based on known falsehoods."); *Liberty Lakes Invs., Inc.* v. *Magnuson*, 12 F.3d 155, 159 (9th Cir. 1993) (*Noerr-Pennington* immunity does not apply to a "a party's knowing fraud upon, or its intentional misrepresentations to, the court [that] deprive the litigation of its legitimacy"); *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568, 580 (6th Cir. 1986) (stating that "knowingly false submissions or intentional misrepresentations constitute an abuse of governmental processes" and are not subject to *Noerr-Pennington* immunity); *St. Joseph's Hosp., Inc.* v. *Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986) (misrepresentations before a government agency acting in its judicial role "do not enjoy *Noerr* immunity"); *Israel* v. *Baxter Labs., Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972) ("The basic concern . . . may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." (footnotes omitted)); *Woods Exploration & Producing Co.* v. *Aluminum Co. of Am.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir. 1970).[2]

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[2] The only contrary case in this regard is the Third Circuit's decision in *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154, 158 (3rd Cir. 1999), *cert. denied*, 120 S. Ct. 2716 (2000), in which the court held that there is no exception to *Noerr-Pennington* for fraud or misrepresentation. The court in *Armstrong* relied heavily on this Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991), which reaffirmed that deliberate misrepresentations in the *legislative* arena "'reprehensible as [they are], can be of no consequence so far as the Sherman Act is concerned.'" The Third Circuit opinion ignores the decisions of this Court suggesting that *Noerr-Pennington* immunity might be more restricted in the *judicial* context, and is in direct conflict with *Cheminor Drugs*, which the Third Circuit decided less than four months earlier.

In *Kottle* v. *Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999), the Ninth Circuit went to great lengths to emphasize that the fraud exception to *Noerr-Pennington* is a separate exception from the exception for "objectively baseless" claims. The court recognized three types of activity that would be considered "sham" for purposes of *Noerr-Pennington*: (1) an "objectively baseless" lawsuit; (2) a pattern of multiple lawsuits, brought "'without regard to the merits and for the purpose of injuring a market rival,'" *id.* (quoting *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800 (9th Cir. 1994)); and (3) the "making [of] intentional misrepresentations," which "'deprive the litigation of its legitimacy.'" *Id.* (quoting *Liberty Lake Invs.*, 12 F.3d at 158).

The Ninth Circuit's fraud exception stems from an extension of the *Walker Process* doctrine. Just as "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present," *Walker Process Equip., Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 174 (1965), so too any attempt to violate antitrust law through fraud or misrepresentation is itself a violation of the Sherman Act. *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982); see also *Potters Med. Ctr.*, 800 F.2d at 580 ("Such knowingly false submissions or intentional misrepresentations constitute an abuse of governmental processes, analogous to the antitrust violation which occurs when one procures a patent through fraud on the patent office."). On the basis of this analogy, the Ninth Circuit has rejected the argument that the misrepresentation must be "material" to the proceeding: "neither *Walker Process*, nor subsequent cases, require that the body on whom the fraudulent misstatements are pressed ultimately believe those statements . . . . *Walker Process* recognizes that fraud-

ulently supplying information can result in monopolization, and therefore violate the antitrust laws." *Clipper Exxpress*, 690 F.2d at 1262 (citations omitted). Furthermore, because "[a]dministrative bodies and courts," unlike political bodies "rely on the information presented by the parties before them . . . [and] seldom, if ever, have the time or resources to conduct independent investigations," a private cause of action for fraudulent statements, both material and not, would deter parties from engaging in such misrepresentations. *Id.* (footnote omitted).

Whereas the Second and Third Circuits view the fraud exception as an extension of the sham exception for objectively baseless lawsuits, the other courts of appeals to consider the question view it as a separate exception, rooted in the notion that attempts to defraud judicial bodies are not worthy of immunity from the antitrust laws. Misrepresentations before adjudicative bodies undermine the legitimacy of these bodies and impair their functioning to the same, if not greater, extent than does the pursuit of "objectively baseless" claims. The differing views on whether such frauds and misrepresentations must be material to fall outside *Noerr-Pennington* is a symptom of these widely disparate theories of the fraud exception.

II. THE COURT SHOULD GRANT THE PETITION TO DETERMINE THE PROPER SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE.

A. *Noerr-Pennington* Immunity Applies Exclusively To Claims Brought Under The Sherman Act.

The Second Circuit's decision is contrary to the *Noerr-Pennington* doctrine as it was initially conceived, and how it later developed. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961), this Court, in establishing antitrust immunity for petitioning activity, relied on two grounds, both rooted in a construction of the

Sherman Act. First, the Court explained that any interpretation of the Sherman Act that would impose liability for petitioning activities "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137; see also *id.* at 144 ("[W]e conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case."). Second, the Court noted that a contrary construction of the Sherman Act might "raise important constitutional questions," *id.* at 138. Although the *Noerr* Court recognized a constitutional element to this petitioning immunity in the antitrust area, this Court has explicitly recognized that this immunity derives, at base, from an interpretation of the Sherman Act. See *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (noting that the Court has "[*i*]*nterpret*[*ed*] *the Sherman Act* in the light of the First Amendment's Petition Clause" (emphasis added)).

The only cases in which this Court has applied, or even considered the application of, *Noerr-Pennington* immunity have been antitrust cases. See, *e.g.*, *PREI*, 508 U.S. 49, 52 (1993); *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 369 (1991); *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 421; *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 497 (1988); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 509 (1972); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 659 (1965); *Noerr*, 365 U.S. at 129. Although this Court has, of course, recognized immunity for petitioning activities in other contexts, it has done so only after a thorough consideration of the First Amendment right to petition, see, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (finding a nonviolent boycott was entitled to First Amendment immunity from state antitrust and tort statutes), or through a careful construction of the particular statute at

issue, in light of the First Amendment right to petition, see, *e.g.*, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983) (in considering whether the filing and prosecution of a lawsuit by an employer can be enjoined, stating that it must "be sensitive to these First Amendment values in construing the [National Labor Relations Act] in the present context").

This Court has provided instruction for how *Noerr-Pennington* should be extended, if it is to be extended at all, to other federal statutes. In *Bill Johnson's Restaurants*, this Court considered whether it is lawful under the National Labor Relations Act ("NLRA") for a State to enjoin an employer from bringing a retaliatory suit against its employees based on insubstantial claims. 461 U.S. at 743. While the Court considered the First Amendment rights of the plaintiffs, the inquiry at base concerned the proper construction of the NLRA, which rested on several factors:

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to *construe the Act* as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

Id. at 745 (emphasis added); see also *id.* at 741 ("[w]e construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose . . . . We should be sensitive to these First Amendment values in construing the NLRA in the present context." (citation omitted)). Although the Court borrowed much of its reasoning from the *Noerr-Pennington* line of cases, it made clear that it did so only by analogy. *Id.* at 744 ("Considerations analogous to these led us in the antitrust context to adopt the 'mere sham' exception . . . ."); see also

PREI, 508 U.S. at 59 ("*by analogy* to *Noerr*'s sham exception, we held that even an 'improperly motivated' lawsuit may not be enjoined under the [NLRA] . . . unless such litigation is 'baseless'" (emphasis added)).

The Second Circuit erred by failing to undertake such an analysis before extending *Noerr-Pennington* immunity to the RICO context. The peculiarities of the Sherman Act are simply not present in the RICO statute. In particular, the *Noerr* Court found that conspiracies to petition the government do not fall within the Act's restriction on "combination[s] . . . in restraint of trade," 15 U.S.C. § 1, because

> they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

Noerr, 365 U.S. at 136. Moreover, "difficulties . . . would be presented by a holding that the Sherman Act forbids association for the purpose of influencing the passage or enforcement of laws." *Id.* at 137

Similar immunity is not necessary to protect associations for the purpose of defrauding the government. Moreover, it cannot be said that such conspiracies are of a different type than those activities that the statute covers. In contrast to the Sherman Act, which this Court construed to cover only *business* activities that traditionally came within the scope of the statute, there is nothing to suggest that liability would not attach to conspiracies to deceive the government through fraudulent submissions and misrepresentations. 18 U.S.C. § 371 explicitly brings such activity within its scope,

criminalizing the activities of "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." And, as this Court has recognized on numerous occasions, Congress pointed out in an uncodified section of the Act that RICO should be "liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947; see *Russello* v. *United States*, 464 U.S. 16, 27 (1983); *United States* v. *Turkette*, 452 U.S. 576, 587 (1981). Of course, as this Court has hastened to point out, this is not "an invitation to apply RICO to new purposes that Congress never intended," *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993), but nothing in the Act or its purposes suggest that Congress carved out an exception for conspiracies involving fraudulent petitioning activity. Whereas combinations to petition the government might be legitimate and as such cannot be found violative of the Sherman Act, when the actions are found to violate a predicate criminal statute, as alleged here, there is no countervailing social benefit that supports immunizing such action from RICO liability.

Although courts, like the Second Circuit, often use *Noerr-Pennington* and the First Amendment Right to Petition interchangeably, the danger of this cannot be overstated. *First*, a blanket invocation of *Noerr-Pennington* immunity without a thorough consideration of the statute at issue or of the First Amendment right to petition wrongly extends the scope of both doctrines. The Tenth Circuit in *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n* made clear that the *Noerr-Pennington* doctrine and the First Amendment are not co-extensive in the activities that they immunize: whereas pre-litigation threats might be immunized against antitrust liability by the former, they are not by the latter, because they do not technically "petition the Government." 208 F.3d 885,

890-93 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000). Moreover, whereas *Noerr-Pennington* provides absolute immunity, subject to the sham exceptions, claims under the Petition Clause are subject to general First Amendment limitations. See *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985) ("To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status."). As such, courts must be cautious in the appellations they use because the type of immunity is determinative of its scope.

Second, established principles of constitutional interpretation dictate that courts should be cautious in extending constitutional doctrines to avoid intrusion into areas that are within the domains of the states. See *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (stating that "[Equal Protection] scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives"); cf. *Gregory* v. *Ashcroft*, 501 U.S. 452, 467-70 (1991). Recently, however, the confusion over whether *Noerr-Pennington* is of constitutional or statutory magnitude has led to uncertainty regarding its applicability in state courts, in particular to state common law causes of action. Many states recognize a tort for "abuse of process," when plaintiffs undertake state legal proceedings, even if objectively meritorious, to pursue collateral objectives unrelated to those within the scope of the litigation. If *Noerr-Pennington* is treated as a First Amendment doctrine, then plaintiffs would generally be immunized against claims of abuse of process. State courts have split on the question of *Noerr-Pennington*'s applicability to state common law causes of action, and this Court should resolve this important question, which goes to the heart of a state's ability to regulate its own judicial process. Compare *Pound Hill Corp.* v. *Perl*, 668 A.2d 1260, 1264 (R.I. 1996) ("the *Noerr-Pennington* doctrine, resting as it does upon the First Amendment right to petition, does add a

constitutional gloss to civil actions for abuse of process"), and *Cove Road Dev.* v. *Western Cranston Indus. Park Assocs.*, 674 A.2d. 1234, 1237 (R.I. 1996) ("the constitutional protection of the right to petition is no less compelling in the context of common-law tort claims than in the framework of federal antitrust legislation"), and *Protect Our Mountain Env't, Inc.* v. *District Court*, 677 P.2d 1361, 1364-66 (Colo. 1984), with *Florida Fern Growers Ass'n* v. *Concerned Citizens*, 616 So.2d 562, 569 (Fla. Dist. Ct. App. 1993) (declining to apply the *Noerr-Pennington* doctrine to common law torts because the common law adequately protects plaintiffs' "'First Amendment rights and adequately guards against the danger of intimidation suits'").

B. The Fraud Exception To *Noerr-Pennington* Immunity Applies Regardless Of Whether The Government Is Influenced By The Fraud.

Although this Court has never resolved the question whether *Noerr-Pennington* immunity extends to misrepresentations made in adjudicatory proceedings, see, *e.g.*, *PREI*, 508 U.S. at 62 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."), it has certainly provided support for such a fraud exception. See, *e.g.*, *California Motor Transp.*, 404 U.S. at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); see also *id.* at 516-17 (Stewart, J., concurring in the judgment) ("In *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here, . . . the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or

bribery."); *Allied Tube & Conduit Corp.*, 486 U.S. at 500 & n.4 (stating that "in whatever forum, private action that is not generally aimed at procuring favorable government action is a mere sham" that can result in antitrust violations, but that "in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations").

The language of these opinions suggest that whereas only objectively baseless actions will fall within an exception to *Noerr-Pennington* in the political context, the exception to *Noerr-Pennington* in the adjudicative context is much broader. Whereas robust debate may uncover certain misrepresentations in the realm of politics, the same is not necessarily true in the judicial realm. As the Ninth Circuit in *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, stated:

> There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

690 F.2d 1240, 1261 (9th Cir. 1982). Just as fraudulent misrepresentations are sufficient to strip a patent holder of the immunity that the patent laws provide from antitrust liability, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174; *id.* at 180 (Harlan, J., concurring) ("as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play"), so too misrepresentations during judicial proceedings are sufficient to strip a litigant of *Noerr-Pennington* immunity from the antitrust laws.

The Second Circuit's emphasis on the outcome of the action, however, reflects an unduly narrow conception of the sham exception for misrepresentations in the judicial arena. When we consider a single lawsuit brought to inflict collateral harm on a competitor, it makes sense to consider whether the lawsuit is "objectively baseless" because no reasonable plaintiff would bring the lawsuit if only interested in the outcome of the litigation. However, when a competitor abuses the judicial process, not through an objectively baseless lawsuit, but rather by committing fraud in the course of the lawsuit, the question whether the lawsuit itself was objectively baseless, or whether the decisionmaker relied on the fraud, is beside the point.

First, intentional misrepresentations are attempts to distort and delegitimize the judicial process, unworthy of the protection of *Noerr-Pennington*, whether in the end they succeed or not. A misrepresentation can go to the heart of an action, even if it does not provide the grounds for the eventual outcome of the action. This case provides a perfect example. MHP's misrepresentations as to various safety problems at the facility surely went to the core of the FERC proceeding, despite the fact that, in the end, the action was dismissed due to CNGT's failure to provide requested information.[3] Surely this fortuity, perhaps relevant to an eventual damages inquiry, is irrelevant to the question whether MHP's submissions should be immunized.

Second, since the focus of the sham exception is on the *collateral* harm, it is possible that the fraud will have no impact on the actual outcome of the proceeding, but will nonetheless have a drastic anticompetitive effect. As Bath Petroleum alleges, MHP's fraudulent submissions to FERC

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[3] In fact, EPA, the only agency to consider MHP's objections on the merits, rejected the claim that a geological fault under the facility made it environmentally unstable. *See supra* at 7.

were made as part of a greater effort to prevent a competitive entity from gaining access to the natural gas storage market by: (1) delaying Bath Petroleum's permit approval process for such a substantial period of time that MHP could obtain approval of its own Tioga project prior to Bath Petroleum's obtaining its own required permits; (2) increasing Bath Petroleum's transactional costs so significantly that it would ultimately abandon its efforts to become a natural gas storage facility; and (3) causing sufficient delays to prompt CNGT to terminate the lease agreement. App. 68a (Complaint, ¶ 83). CNGT decided to terminate the lease with Bath Petroleum as a direct result of MHP's actions, long before FERC's determination that CNGT had failed to provide all requested information. As such, these fraudulent submissions were certainly "material" to the collateral harm caused, even if not to the actual FERC proceeding. It is precisely this sort of behavior that the sham exception is meant to prevent.

The scope of the sham exception for fraud or misrepresentations is of great importance in protecting courts and other judicial bodies against deception, and the Second Circuit's decision reflects a grave misunderstanding of the *Noerr-Pennington* doctrine and the sham exception. Over seven years have passed since this Court left open the question whether such an exception exists, see *PREI*, 508 U.S. at 61 n.6, and sufficient time has elapsed for this issue to percolate within the lower courts. Intentional fraud in an adjudicatory context that has both the intent and effect of causing a massive competitive injury has no redeeming social value, and, unlike legitimate, objectively meritorious petitioning activities, it cannot be argued that such behavior is outside the scope of the Sherman Act or the RICO statute. As such, private causes of action must be allowed to go forward to remedy and deter such fraudulent and anti-competitive behavior in the future. The opportunity is ripe for the Court to resolve this open question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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